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**IN THE  
COURT OF APPEALS OF INDIANA**

GILMORE CONSTRUCTION, INC.,  
GARY GILMORE and RUTH GILMORE,

Appellants-Plaintiffs,

VS.

INDIANA DEPARTMENT  
OF TRANSPORTATION,

Appellee-Defendant.

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No. 10A05-0512-CV-715

APPEAL FROM THE CLARK SUPERIOR COURT  
The Honorable Jerome Jacobi, Judge  
Cause No. 10D01-0401-PL-006

**October 17, 2006**

**MEMORANDUM DECISION - NOT FOR PUBLICATION**

**BAKER, Judge**

Appellants-plaintiffs Gilmore Construction, Inc., and Gary and Ruth Gilmore

(collectively, the Gilmores) appeal the trial court's grant of appellee-defendant Indiana Department of Transportation's (INDOT) motion to dismiss the Gilmores' action against INDOT for inverse condemnation, conversion, slander of title, and tortious interference with a contractual relationship. Specifically, the Gilmores contend that dismissal was improper because the allegations set forth in their complaint are sufficient to state claims upon which relief could be granted. After reviewing this matter under a summary judgment standard because the trial court considered a number of exhibits that were attached to the Gilmores' complaint, we conclude that the designated evidence establishes that INDOT was entitled to judgment as a matter of law.

### FACTS

The Gilmores are the owners and developers of the Boulder Creek Subdivision in Clark County. Beginning in the summer of 2002, various State personnel began issuing public statements regarding plans to construct bridges across the Ohio River between Indiana and Kentucky. In particular, a new eastern bridge was to cross a portion of the Gilmores' property to connect a freeway in Kentucky with Indiana State Road 265. This information was published and disseminated by state officials and their agents through local media in southern Indiana, which is the Gilmores' marketing and sales area. Community Transportation Solutions (CTS) participated in the process that ultimately led to an award of a management contract for the \$1.9 billion project.

On July 27, 2002, INDOT officially announced that various bridge routes had been chosen by Kentucky and Indiana officials. Thereafter, State personnel informed the

Gilmores that they would be provided with maps and additional information regarding the routes. A proposed map was ultimately provided to the Gilmores in November, 2002. It was determined that the eastern bridge would be placed in an area that would cross and affect the Gilmores' ability to develop and build on the property.

The Gilmores maintained that the publications and statements made by State personnel directly diminished their ability to sell homes and real estate in the Boulder Creek Subdivision and other surrounding areas. Hence, the Gilmores contended that their property had been taken and converted from them because of the published announcements and newspaper accounts of the project.

On August 27, 2003, the Gilmores filed their complaint against INDOT, the Commissioner of that agency, and CTS, alleging that the continuous published announcements constituted substantial interference with the Gilmores' private property rights to the extent that the announcements destroyed or impaired the Gilmores' "free use, enjoyment or interest in their real estate." Appellants' App. p. 57. The Gilmores also alleged that INDOT intentionally interfered with the Gilmores' contracts without consent and without justification, causing the Gilmores to lose sales and profits. Thereafter, on March 30, 2004, the Gilmores filed their first amended complaint seeking damages for inverse condemnation, civil conversion, slander of title, and interference with contractual relationships. Appellants' App. p. 54-60.

Attached to the amended complaint were a number of exhibits consisting of newspaper articles regarding the bridge project. In an article from the Louisville Courier-

Journal dated July 26, 2002, it was reported that “[t]he eastern route requires taking 109 residences, the majority of them homes that have been built during the past year in fast-growing eastern Clark County.” Appellants’ App. p. 63. The article also stated that the number of homes taken by eminent domain could rise because of the development projects in southern Indiana. Id. Another article attached to the Gilmores’ complaint showed the precise location of the bridge, along with a cartoon showing a “taxpayer” observing two developers talking in front of houses under construction in an area entitled “Bridgepath Estates.” One of the developers says, “[w]e’ve already got a prospective buyer for several houses” and the other developer says, “Sucker.” Id. One of the exhibits included a newspaper story dated July 24, 2003, in which the Courier-Journal reported that CTS was selected to manage the project and quoted a Kentucky deputy state highway engineer as saying that the announcement of the construction company selection was made a month earlier than expected because “we want to get this project jump-started.” Id. at 90. The Gilmores also attached a map to their complaint that was published in the Courier-Journal on July 27, 2002, which shows the location of their two real estate developments.

Thereafter, on September 18, 2003, INDOT moved to dismiss the action under Indiana Trial Rule 12(B)(6), alleging that Indiana does not recognize a cause of action for inverse condemnation absent a physical invasion or regulation of real property. Thus, the State claimed that the public announcements made by State personnel as well as the news stories that were published did not constitute a physical invasion or regulation of real property and did not amount to a “taking” of the Gilmores’ property. Id. at 135-36. Moreover, the State

claimed that because a sales market is not a real property interest, the Gilmores could not seek relief under Indiana Code section 32-24-1-16, the statute governing inverse condemnation actions. Finally, the State asserted that changes in property value pending a road project did not constitute a taking for purposes of the statute. As a result, the State requested the trial court to dismiss all of the Gilmores' claims.

On May 25, 2004, legal counsel for INDOT sent a letter to the Gilmores' counsel, indicating that the Gilmores and INDOT had met on May 5, 2004, and that INDOT would make the Gilmores an offer for their property on or before July 1, 2004. The letter noted the parties' understanding "that if the Gilmores reject INDOT's offer and condemnation is necessary, the parties will work towards expediting the condemnation process." Id. at 167.

On January 19, 2005, the State filed a complaint against the Gilmores for the appropriation of their real estate, alleging that the parties had been unable to agree on a purchase price or to the amount of damages that might be sustained by reason of the real estate appropriation. Thus, the State requested that the trial court order appropriation following an appraisal of the land. Following a hearing, the trial court dismissed the Gilmores' complaint, and they now appeal.

## DISCUSSION AND DECISION

### I. Standard of Review

In reviewing the dismissal of a claim under Trial Rule 12(B)(6), we afford no deference to the trial court's decision. Thus, our review is de novo. Weiss v. Ind. Parole Bd., 838 N.E.2d 1048, 1050 (Ind. Ct. App. 2005), trans. denied. A motion to dismiss based

on Trial Rule 12(B)(6) tests the sufficiency of a claim and not the facts supporting it. Id. Viewing the complaint in the light most favorable to the non-moving party, this court must determine whether the complaint states any facts upon which the trial court could have granted relief. Id.

In this case, however, the Gilmores' first amended complaint included ten exhibits and the State attached a number of exhibits to its brief in support of the motion to dismiss. Thus, Trial Rule 12 provides that if a defense is asserted under section 12(B)(6) and "matters outside the pleading are presented to and not excluded by the court, the motion shall be treated as one for summary judgment and disposed of as provided in [Trial] Rule 56." Inasmuch as the trial court did not exclude the parties' exhibits, we apply the standard of review for judgments entered under Trial Rule 56. Hence, our standard of review is the same as that of the trial court: summary judgment is appropriate only where the evidence shows there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. Ind. Trial Rule 56(C); Am. Home Assurance Co. v. Allen, 814 N.E.2d 662, 666 (Ind. Ct. App. 2004). A party seeking summary judgment bears the burden of making a prima facie showing that there are no genuine issues of material fact and that the party is entitled to judgment as a matter of law. Tack's Steel Corp. v. ARC Constr. Co., Inc., 821 N.E.2d 883, 888 (Ind. Ct. App. 2005). Once the moving party satisfies this burden through evidence designated to the trial court pursuant to Trial Rule 56, the nonmoving party may not rest on its pleadings, but must designate specific facts demonstrating the existence of a genuine issue for trial. Id. Neither the trial court nor the reviewing court may look beyond

the evidence specifically designated to the trial court. Best Homes, Inc. v. Rainwater, 714 N.E.2d 702, 705 (Ind. Ct. App. 1999). The court must accept as true those facts alleged by the nonmoving party, construe the evidence in favor of the nonmovant, and resolve all doubts against the moving party. Shambaugh & Son, Inc. v. Carlisle, 763 N.E.2d 459, 461 (Ind. 2002). A party appealing from an order granting summary judgment has the burden of persuading us that the decision was erroneous. Sizemore v. Erie Ins. Exch., 789 N.E.2d 1037, 1038-39 (Ind. Ct. App. 2003).

## II. The Gilmores' Claims

### A. Inverse Condemnation

The Gilmores first allege that the trial court erred in granting judgment to INDOT on their claim for inverse condemnation. Specifically, the Gilmores argue that the use and value of their property were substantially diminished as a result of INDOT's actions, including announcements and public statements of various state officials regarding the bridge project.

We initially observe that the Gilmores' inverse condemnation action against INDOT is based upon Indiana Code section 32-24-1-16, which provides that a "person having an interest in property that has been or may be acquired for public use without the procedures of this article (eminent domain) or any prior law followed is entitled to have the person's damages assessed under this article substantially in the manner provided in this article." In INDOT v. Southern Bells, Inc., 723 N.E.2d 432 (Ind. Ct. App. 2000), this court defined an inverse condemnation action as follows:

Inverse condemnation is a cause of action against an entity with the power to condemn (usually a governmental defendant) to recover the value of property

which has been taken in fact, even though no formal exercise of the power of eminent domain has been attempted by the taking agency. “While the typical taking occurs when the government acts to condemn property in the exercise of its power of eminent domain, the entire doctrine of inverse condemnation is predicated on the proposition that a taking may occur without such formal proceedings.” The action is brought by the owner rather than the condemnor. It is not based on tort, but on the constitutional prohibition of the taking of property without just compensation.

Id. at 434 n.1. Similarly, in Bussing v. INDOT, 779 N.E.2d 98 (Ind. Ct. App. 2002), this court stated the following criteria for a landowner to establish in an inverse condemnation claim:

The general rule is that, before any basis for compensable damage may be obtained by an owner of real estate in an eminent domain proceeding, either some physical part of the real estate must be taken from the owner or lessor, or some substantial right attached to the use of the real estate taken; it must be special and peculiar to the real estate and not some general inconvenience suffered alike by the public.

Id. at 104 (emphasis added). Here, the Gilmores must prove that INDOT’s action amounted to a compensable taking of their property, at which time a factfinder would decide the amount of damages due. Jenkins v. Bd. of County Comm’rs, 698 N.E.2d 1268, 1271 (Ind. Ct. App. 1998).

In this case, the Gilmores maintain that INDOT’s taking of their property occurred during the two-and-one-half-year period between the July 2002 announcement of the bridge project and the January 2005 filing of the State’s condemnation action. However, the designated evidence establishes that there was no physical invasion or regulation of the Gilmores’ real property during this time. To be sure, the Gilmores merely claimed that their right to the use the real estate was affected because the newspaper stories reported INDOT’s



plans to build the bridges—one of which would require highway construction over the Gilmores' property. Other than those references, the Gilmores have failed to establish that any of INDOT's actions affected their rights with regard to their use of the property. Also, the Gilmores have not established that any purported damages suffered by them were special and peculiar to their real estate. Hence, these facts do not establish a compensable taking.

As an aside, we note that under the Gilmores' reasoning, a property owner would have compensable damages any time that the government announces a new building project. However, such is the type of loss that would ultimately be compensated by the payment of damages under eminent domain proceedings pursuant to Indiana Code section 32-24-1 et seq. Here, the State has instituted such an action, and the Gilmores will receive damages as determined by appraisals of their property. See I.C. § 32-24-1 et seq. It is also apparent that any damages that the Gilmores might have incurred were the result of their unilateral decision to continue developing and building in spite of the knowledge that their property was in the path of the bridge that was to be constructed across their property. As the May 25, 2004, correspondence from INDOT's counsel to the Gilmores indicates, the Gilmores had conferred with various State personnel about the purchase of their property. Hence, any purported damages were brought about by the Gilmores' own decision to continue building and developing in spite of their knowledge that their property was in the path of the bridge. For these reasons, we conclude that the trial court properly entered judgment for INDOT with respect to the Gilmores' inverse condemnation claim.

## B. Remaining Claims

### 1. Slander of Title

The Gilmores also contend that the trial court erred in dismissing their slander of title claim against INDOT. To succeed upon this claim, the Gilmores were required to show “that false statements were made, with malice, and that the plaintiff sustained pecuniary loss as a necessary and proximate result of the slanderous statements.” Isanogel Ctr. Inc. v. Father Flanagan’s Boys Home, Inc., 839 N.E.2d 237, 246 (Ind. Ct. App. 2005). In support of their argument, the Gilmores claim that “[g]iven the voluminous number of published public announcements by state officials, . . . sufficient elements of recklessness or reckless disregard for accuracy or truthfulness can be shown at hearings or trial, beyond the pleading stage.” Appellants’ Br. p. 22. More specifically, the Gilmores point to Exhibit C, which was attached to the amended complaint, wherein it was reported that State officials commented that the “east end bridge” and the destruction would “take out at least 80 homes in developing subdivisions,” which included the Gilmores’ subdivisions. Appellants’ App. p. 51. In essence, the Gilmores contend that such a statement was reckless and malicious because INDOT personnel made these statements without regard as to whether they were accurate.

Contrary to the Gilmores’ claims, these reports merely demonstrated that the path of one of the bridges would pass through a rapidly-developing part of Clark County and that State officials had difficulty estimating the number of residences that would actually be affected. Under these circumstances, the designated evidence failed to establish that such

statements were false and malicious. As a result, the trial court properly entered judgment for INDOT on this claim.

## 2. Civil Conversion

Next, the Gilmores argue that the trial court erred in dismissing their claim against INDOT for conversion. Specifically, the Gilmores contend that the evidence established that their claim should survive because there was a pecuniary loss “to their stock [values], due to the state’s actions in the 2-1/2 year announcement campaign” of the plan to construct the bridges. Appellants’ Br. p. 23.

In addressing this issue, Indiana Code section 34-24-3-1 provides that “if a person suffers pecuniary loss as a result of a violation of [the criminal conversion statute], . . .the person may bring a civil action against the person who caused the loss for [damages].” Our conversion statute, Indiana Code section 35-43-4-3, provides that “a person who knowingly or intentionally exerts unauthorized control over property of another person commits criminal conversion.” In order to establish a viable claim, a plaintiff must show a violation of one of the specific code sections under Article 43 and that such violation caused the plaintiff’s loss. McLemore v. McLemore, 827 N.E.2d 1135, 1144 (Ind. Ct App. 2005).

Here, the Gilmores fail to cite any of the specific provisions of the criminal conversion statute as the basis of their claim. Instead, they define conversion as “the appropriation of personalty of one’s property to another’s own use and benefit, or in its destruction, or in exercising dominion of it, in exclusion and defiance of the rights of the owners or lawful possessor, or in withholding it from possession under a claim and title inconsistent with the

owner's.” Appellants’ Br. p. 23. Inasmuch as the Gilmores have failed to cite the specific code provision and definition as the basis for INDOT’s alleged liability, we conclude that the trial court properly entered judgment for INDOT on their conversion claim. Moreover, even assuming solely for argument’s sake that the Gilmores correctly defined the term of conversion, they cannot succeed because—as noted above—eminent domain proceedings are permitted by law with respect to the appropriation of property by the State.

### 3. Contractual Interference and Interference with Advantageous Relations

Finally, the Gilmores contend that the trial court erred in dismissing their claims for INDOT’s alleged tortious interference with a business relationship. In particular, the Gilmores base this claim on the allegation that their ongoing business activities regarding their development and home sales in the subdivision by “contract through advantageous business relations in Utica Township, Indiana have been damaged by [INDOT’s] actions.” Appellants’ Br. p. 19.

In Felsher v. Univ. of Evansville, 755 N.E.2d 589, 598 n.21 (Ind. 2001), our Supreme Court identified the following elements in this type of action: “(1) the existence of a valid relationship; (2) the defendant’s knowledge of the existence of the relationship; (3) the defendant’s intentional interference with that relationship; (4) the absence of justification; and (5) damages resulting from the defendant’s wrongful interference with the relationship.” Moreover, illegal conduct is an essential element of tortious interference with a business relationship. Id.

Here, it is apparent that the Gilmores’ development business may have involved valid

business relationships and INDOT may certainly have been aware of those dealings. However, the designated evidence fails to show that the public statements made by INDOT personnel or any action that it took were made with the intent to interfere with the Gilmores' business relationships. Rather, it is apparent that INDOT was merely acting in the public interest—it was not a business that would obtain any financial advantage from interfering with the Gilmores' dealings with others. Moreover, there is absolutely no showing that INDOT engaged in any illegal conduct. That said, the Gilmores have failed to demonstrate that the bridge project and the attendant publicity amounted to any bad motives on the part of the State. To be sure, a project as immense as the construction of two bridges across the Ohio River will necessarily involve lengthy advance planning and a number of homes and businesses would be affected. Hence, there is absolutely no evidence that INDOT pursued this project to punish individual property owners or interfere with contractual relationships as the Gilmores contend. As a result, we conclude that the trial court properly entered judgment for INDOT with respect to this claim.

The judgment of the trial court is affirmed.

VAIDIK, J., and CRONE, J., concur.